Supreme Court, U.S.
FILED
941907 MAY 2 - 1995
OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1994

MORRIS WINSTON WILSON,

Petitioner,

VS.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

OLLIE RUTH JEFFERSON
Counsel of Record
1601 East Lamar Blvd.
Suite 106
Arlington, Texas 76011
(817) 861-7002
(817) 861-5543 FAX

51 pp

QUESTION PRESENTED

1. Does the Board's decision in Ozkok making definition of the term "conviction" a federal law question violate the principles of stare decisis when this Court has beforehand reversed a First Circuit decision holding the same opinion?

2. Does the Ozkok standard making determination of conviction for immigration purposes a federal law question consistent with congressional intent when congress in a subsequent legislation in 18 U.S.C. § 921 has overruled Dickerson v. New Banner, Inc., which the Board cited with approval in Ozkok to support its position?

3. Is the new standard for determining conviction for immigration purposes arbitrary and capricious because it reverses longstanding agency policy in the absence of any intervening change in circumstances?

TABLE OF CONTENTS

	PAGES
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
BASIS FOR JURISDICTION	2
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
I. THE COURT OF APPEALS DECISION UPHOLDING THE BOARD'S DECISION IN OZKOK WHICH CONSIDERS "CONVICTION" AS A QUESTION OF FEDERAL AND NOT STATE LAW, CONFLICTS WITH PRECEDENTS OF THIS COURT	8
II. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE SECOND CIRCUIT'S DECISION IN REHMAN V. IMMIGRATION & NATURALIZATION SERVICE ON WHETHER A DEFENDANT IS SUBJECT TO MANDATORY DEPORTATION AFTER HE IS GRANTED RELIEF FROM ALL PENALTIES AND DISABILITIES RESULTING FROM THE CONVICTION	12

III. THE OPINION BELOW UPHOLDING THE VALIDITY OF THE PROPOSITION THAT WHAT CONSTITUTES CONVICTION IS A QUESTION OF FEDERAL AND NOT STATE LAW IS INCONSISTENT WITH CONGRESSIONAL INTENT IN LIGHT OF THE CLEAR STATEMENT TO THE CONTRARY IN 18 U.S.C. § 921..... 16

CONCLUSION..... 21

INDEX TO APPENDICES

Appendix A — Opinion of the Court of Appeals reported in Wilson v. I.N.S., No. 94-40492 (5th Cir. Feb. 1, 1995).

Appendix B — Decision of the Board of Immigration Appeals (March 4, 1994).

TABLE OF AUTHORITIES

CASES	PAGES
Dickerson v. New Banner Institute, Inc., 460 U.S. 103 (1983).....	16,17
I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987).....	19
Pino v. Landon, 349 U.S. 901 (1955).....	6,7,8 9,10,11, 12,19,20
Pino v. Nicholls, 215 F.2d 237, 241 (1st Cir. 1954).....	8,9,10
Rehman v. Immigration & Naturalization Service, 544 F.2d 71 (2nd Cir. 1976).....	12,11, 14,15
Rust v. Sullivan, 500 U.S. 173, 187 (1991).....	19
Watt v. Alaska, 451 U.S. 259, 271 (1981).....	19
Will v. INS, 447 F.2d 529, 531 (7th Cir. 1971).....	8

ADMINISTRATIVE DECISIONS

Matter of Garcia, 19 I&N Dec. 270 (BIA 1985).....	11
Matter of Seda, 17 I&N Dec. 550 (BIA 1980).....	11

Matter of Ozkok, 19 I&N Dec. 546 (BIA 1988)..... 6,7,11, 16,18, 19,20

STATUTES

Rule 15(a), FRAP..... 4

United States Code

Title 8 Section 1105(a)..... 4

Title 18 Section 921..... 16,17, 18,20

Title 21 Section 844(b)..... 2,13

Title 28 Section 1254(1)..... 2

Title 28 Section 2341..... 4

Immigration and Nationality Act, § 241(a)(2)(B)(i), (8 U.S.C. § 1251(a)(2)(B)(i))..... 3,5,13, 14

TEX. CODE CRIM. PROC. ANN. art. 42.12 § 20(a) (Vernon Supp. 1990) [formerly Article 42.12 § 7]..... 3,15

TEX. PENAL CODE ANN. art. 4.05 (Vernon Supp. 1990)..... 4

No.

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1994

MORRIS WINSTON WILSON,

Petitioner,

VS.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For the Fifth Circuit

Petitioner, Morris Winston Wilson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on February 1, 1995.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported as Wilson v. I.N.S., No. 94-40492 (5th Cir. Feb. 1, 1995), and appears in Appendix A to this Petition. The Fifth Circuit has granted a stay for mandate pending review on certiorari by this Court.

BASIS FOR JURISDICTION

The Court of Appeals' Opinion in this matter was entered on February 1, 1995. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Controlled Substances Act, 21 U.S.C. § 844(b):

> If any person who has not previously been convicted of violating subsection (a) of this section...or any other law of the United States relating to narcotic drugs, marihuana...is found guilty...or upon a plea of guilty, the court may, without entering a judgment of guilty... defer further proceedings and place him on probation....

Firearm's Owner's Protection Act, 18 U.S.C. § 921:

> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter....

Immigration and Nationality Act, § 241(a)(2)(B)(i), 8 U.S.C. § 1251(a)(2)(B)(i):

> Any alien who at any time after entry has been convicted of a violation of, or a conspiracy or attempt to violate, any law or regulation of a State, the United States, or a foreign country relating to a controlled substance, ...other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

Texas Code of Criminal Procedure, Art. 42.12, Sec.20(a):

> Upon the satisfactory fulfillment of the conditions of probation, the court...shall discharge the defendant. In the case the defendant ...has entered a plea of guilty...such court may set aside the verdict... and shall dismiss the ...information...against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime...to which he has pleaded guilty....

STATEMENT OF THE CASE

The United States Court of Appeals for the Fifth Circuit had jurisdiction pursuant to Title 8 U.S.C. § 1105(a), 28 U.S.C. § 2341 et seq. and by Rule 15(a), FRAP.

On July 15, 1988, Petitioner was charged by Affidavit and Information in the 203rd Judicial District Court of Dallas County, Dallas, Texas for the offense of Unlawful Possession of a Controlled Substance, to wit: knowingly and intentionally possessing a usable quantity of marijuana in an amount of five (5) pounds or less but more than four (4) ounces, in violation of Article 4.05 of the of the Controlled Substances Act of the Texas Penal Code. On the same day, Petitioner pleaded guilty and was assessed a four-year (4) suspended sentence and fined $500.00. On July 17, 1992, after the period of the probation and all conditions of probation having been satisfactorily fulfilled by Petitioner, the Texas court ordered that his

conviction be set aside; dismissed the indictment; discharged him from probation; and released him from all the penalties and disabilities resulting from the judgment of the conviction.

The Immigration and Naturalization Service (hereinafter "INS") initiated deportation proceedings against Petitioner with the issuance of Order to Show Cause on May 31, 1992. Petitioner was charged with deportability under the provisions of Section 241 (a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. 1251 (a)(2)(B)(i), (hereinafter "Act"). At a hearing before the Immigration Judge on October 26, 1992, Petitioner contested deportability and contended that the proceedings should be terminated. On July 1, 1993, the Immigration Judge denied Petitioner's application to terminate the proceedings and found Petitioner deportable. A timely administrative appeal was taken and perfected with the Board of

Immigration Appeals (hereinafter "Board").

On March 4, 1994, the Board relying on its decision in Matter of Ozkok, 19 I & N Dec. 546 (BIA 1988) (hereinafter "Ozkok"), issued an order affirming the Immigration Judge's decision.

Subsequently, Petitioner filed a timely petition for review of the final deportation order to the Court of Appeals for the Fifth Circuit asking the Board's decision be vacated and the Board ordered to enter an order "commanding Respondent to terminate deportation proceedings against Petitioner."

Petitioner contended before the Court of Appeals for the Fifth Circuit that the Board's decision in Ozkok, supra on which the Board the relies as precedent in this matter, was invalid because it effectively overruled this Court's decision in Pino v. Landon, 349 U.S. 901 (1955) and further it was inconsistent with congressional intent. Alternatively, Petitioner

argued that his probationary sentence failed to meet the Ozkok conviction test. Also, Petitioner challenged the finality of his conviction for immigration purposes. On February 1, 1995, the Court of Appeals for the Fifth Circuit, per Judges King, Jolly and DeMoss denied the petition and affirmed the Board's decision. The Fifth Circuit held that the Ozkok conviction standard is valid in that it is consistent with congressional intent and that it is unaffected by the Supreme Court decision in Pino v. Landon.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for three distinct reasons: This Petition presents an issue resolved by implication by this Court but not specifically and unequivocally decided by this Court; the Opinion below conflicts, by implication, with a previous decision of this Court and with the decision of another Circuit; and the Opinion below is contrary to

congressional intent.

I.

THE COURT OF APPEALS DECISION UPHOLDING THE BOARD'S DECISION IN OZKOK WHICH CONSIDERS "CONVICTION" AS A QUESTION OF FEDERAL LAW AND NOT STATE LAW, CONFLICTS WITH PRECEDENTS OF THIS COURT

This Court has held that the deferred adjudication procedure used in Massachuttes was not a conviction for immigration purposes. See Pino v. Landon, supra at 901. Pino involved an alien who had been found guilty of petty larceny and assessed a one-year suspended sentence resulting in a one-year probation in a Massachuttes district court. See Pino v. Nicholls, 215 F.2d 237, 241 (1st Cir. 1954). As described by the Seventh Circuit:

> Under a special Massachuttes procedure, upon satisfactory completion of his probation, his sentence was revoked and his case was put "on file." The "on file" status meant the case remained on the records of the court but no further action would normally be taken.

Will v. INS, 447 F.2d 529, 531 (7th Cir. 1971)

(describing the facts of Pino v. Nicholls). In a subsequent petition for review to the United States Court of Appeals for the First Circuit by the alien concerning whether his conviction was final for immigration purposes, the court held that the "on file" status of the alien's conviction did not void its finality. See Pino v. Nicholls, supra at 244-45.

However, in a brief per curiam opinion, this Court reversed the First Circuit holding by noting:

> On the record here we are unable to say that the conviction has attained such finality as to support an order of deportation within the contemplation of § 241 of the Immigration and Nationality act. The judgment is reversed.

Pino v. Landon, supra at 901. Admittedly, although this Court reversed the decision of the First Circuit, it did not specifically address the statement made in the Appeals Court's opinion that "conviction" was to be defined according to federal and not state law. See

Pino v. Nicholls, supra at 243. Nonetheless, the statement was implicitly overturned since it was part of the judgment before this Court. The fact that this Court failed to address the issue as to whether "conviction" is a federal or state law question does not necessarily indicate this Court's approval of the First Circuit's statement. Addressing only one issue among several raised issues which this Court views as dispositive of an entire case is not new in the long history of this Court. The implicit holding of Pino v. Landon, confirms that "conviction" is to be defined by state law and not federal, thus affects the validity of Ozkok.

In the Opinion below, the Fifth Circuit found that since this Court did not express disagreement in Pino v. Landon with the First Circuit's statement that "conviction" is to be defined by federal and not state law, the Ozkok decision is valid. (See Appendix A, p. A-10). In determining what constitutes "conviction,"

the Board articulated three elements in Ozkok:

> 1. A judge has found the alien guilty or he has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilty;
>
> 2. the judge has ordered some form of punishment, penalty, or restraint on the liberty to be imposed; and
>
> 3. a judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court's order, without the availability of further proceedings regarding the person's guilt or innocence of the original charge.

Ozkok, supra at 551-552.

An analysis of the Ozkok decision reveals that it violates established principles of stare decisis, especially since for long time after this Court's decision in Pino v. Landon, the Board accepted its precedential value and applied its mandate to the particular fact situation presented by a case before it until its decision in Ozkok. See e.g., Matter of Garcia, 19 I&N Dec. 270 (BIA 1985); Matter of

Seda, 17 I&N Dec. 550 (1980). Accordingly, the Fifth Circuit's opinion conflicts with the implicit holding of Pino v. Landon.

II.

THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE SECOND CIRCUIT'S DECISION IN REHMAN V. IMMIGRATION & NATURALIZATION SERVICE ON WHETHER A DEFENDANT IS SUBJECT TO MANDATORY DEPORTATION AFTER HE IS GRANTED RELIEF FROM ALL PENALTIES AND DISABILITIES RESULTING FROM THE CONVICTION

The Opinion of the Fifth Circuit below also is squarely in conflict with the Second Circuit's decision in Rehman v. Immigration & Naturalization Service, 544 F.2d 71 (2nd Cir. 1976) (hereinafter "Rehman"). Although both the Second Circuit and the Fifth Circuit courts agree that the definition of what constitutes "conviction" is an issue of federal law and not state law, the two courts are distant in their views regarding whether a complete relief of disabilities from a conviction shields one from deportation resulting from the conviction.

In Rehman, the alien pleaded guilty to

criminal possession of a controlled substance and was sentenced to a conditional discharge for one year along with a one hundred dollar fine. Id. Under New York law, Rehman was additionally granted a temporary "Certificate of relief from Disabilities" which meant that he would not suffer "automatic forfeiture of any other right or privilege" by virtue of the conviction. Id. at 72-73.

The Second Circuit based its analysis on the fact that in enacting INA § 241(a)(2)(B)(i), Congress turned to state sanctions for deportation purposes. The Second Circuit found that the use of state sanctions imports the consideration to some extent of each state's own system of criminal justice. Rehman, supra at 73. Further, the Rehman court noted that had Rehman been tried on federal charges instead, he would likely not have faced the possibility of deportation because under 21 U.S.C. § 844, a first offender like Rehman, guilty of simple

possession of drugs, can be placed on probation and never convicted at all. Id. at 74. Thus, the court stated:

> Where mandatory deportation would frustrate the purposes of a state's relief statute, and federal law provides for erasure of federal convictions under circumstances identical to those of the case at issue, it seems to us that the state's leniency policy can be respected without fear of undermining enforcement of federal deportation laws.

Id. at 75. The Second Circuit clearly did not consider the alien, Rehman, "convicted" for purposes of INA § 241(a)(2)(B)(i), 8 U.S.C. § 1251(a)(2)(B)(i).

Similarly, Petitioner, in this instance, was charged with simple possession of marijuana and was a first offender. Also, the Texas law under which Petitioner received the four-year suspended sentence, provides that after the defendant has satisfactorily completed his probation, the judge may inter alia set aside the verdict and shall dismiss the information or

indictment against such defendant. TEX. CODE CRIM. PROC. ANN. art. 42.12 § 20(a) (Vernon Supp. 1990) [formerly Article 42.12 § 7]. Additionally, the defendant is released from all penalties and disabilities resulting from the offense or crime from which he has pleaded guilty (emphasis added). Id. The Fifth Circuit completely ignored and failed to consider the Texas legislature's intent in providing the relief in Art. 42.12 § 20(a). Petitioner believes, as articulated by the Second Circuit in Rehman, that the state legislature, in this case Texas, could not have intended that recipients of Art. 42.12 § 20(a) relief would remain subject to mandatory deportation. See Rehman, supra at 73.

The facts of the two cases are identical and therefore Petitioner facing the same analysis as Rehman, would not be held "convicted" for immigration purposes by the Second Circuit as the Opinion below from the Fifth Circuit

holds.

III.

THE OPINION BELOW UPHOLDING THE VALIDITY OF THE PROPOSITION THAT WHAT CONSTITUTES CONVICTION IS A QUESTION OF FEDERAL AND NOT STATE LAW IS INCONSISTENT WITH CONGRESSIONAL INTENT IN LIGHT OF THE CLEAR STATEMENT TO THE CONTRARY IN 18 U.S.C. § 921

The Opinion below is inconsistent with congressional intent due to its validation of the Ozkok standard. The Board in Ozkok cited with approval, this Court's decision in Dickerson v. New Banner Institute, Inc., 460 U.S. 103 (1983), for its proposition that "Congress did not intend for the definition of a conviction to be dependent upon the vagaries of state law." Matter of Ozkok, supra at 551 n. 6. Congress has subsequently overruled Dickerson by enacting the Firearms Owners' Protection Act which provides that a conviction should be defined in accordance with the laws of the jurisdiction in which the proceedings are held. 18 U.S.C. § 921. The Fifth Circuit,

noted in the Opinion below that the definition of "conviction" in the Firearms Owners' Protection Act should not be interpreted broadly as Petitioner has asserted in that it is specific to federal gun control laws. (See Appendix A, p. A-8 to A-9). It is apparent the court below has overlooked the fact that although Dickerson involved federal gun control laws, the Board interpreted the decision broadly and thereby made it applicable to the immigration laws in support of its view that the definition of "conviction" was a federal law question. Now that Congress has overruled Dickerson, and stated clearly what constitute "conviction," the Board has decided to limit its broad interpretation with respect to the issue of what constitute "conviction" for federal purposes.

The Fifth Circuit's efforts in support of the Board's position to now apply the definition of "conviction" in 18 U.S.C. § 921 narrowly

simply cannot be sustained. The position taken by the Board is hypocritical and to allow that to stand would be tantamount to extending power to an agency to interpret and apply a case or statute broadly when it advances its goals and do exactly the opposite when the agency believes it hinders its goals. Under recognized tenets of statutory construction, Congress' re-enactment of 18 U.S.C. § 921 implies its affirmance of the Board's pre-Ozkok interpretation of what constitutes conviction. Thus, the subsequent legislation of 18 U.S.C. § 921 should confirm the pre-Ozkok agency policy regarding "conviction" as consistent with congressional intent. In short, the Ozkok decision is inconsistent with and contrary to congressional intent, and seriously undermines the purposes of uniformity of what constitutes "conviction" for federal purposes in light of the clear congressional mandate in the Firearms Owners' Protection Act, 18 U.S.C. § 921.

Further, the decision below noted that the Board has discretion to reinterpret the INA if it employs a "reasoned analysis." (citing Rust v. Sullivan, 500 U.S. 173, 187 (1991)). (See Appendix A, p. A-11). Whereas Petitioner does not dispute that assertion, this Court has, however, noted that when an agency rejects its own long-standing interpretation, its current pronouncement is entitled to less deference than one which has been consistently held. Watt v. Alaska, 451 U.S. 259, 271 (1981); I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987). The deference accorded the Board with respect to the Ozkok decision and its reasoning, should be a lot less, in this instance, especially considering what clearly appears to be an attempt by the agency to overrule this Court's opinion in Pino v. Landon, supra, and also the inconsistency with congressional intent. The decision below would permit a regulatory agency to achieve a prohibited abdication of its own

long-standing interpretation without much authority for support by adopting a policy which amounts to disregard for congressional intent and legal precedence. Thus, the Ozkok standard is arbitrary and capricious.

This Court should take the opportunity to clarify its holding Pino v. Landon, supra. Pino v. Landon in no way purports to validate the notion that what constitutes "conviction" for immigration purposes is a federal and not a state matter. Rather, since the judgment of the First Circuit was reversed in its entirety, it is reasonable to argue that this Court's holding implicitly lends support to the opinion that what constitutes "conviction" is a state law question. Furthermore, this Court should revaluate the Board's approach to reaching the Ozkok decision and whether or not the decision is currently consistent with congressional intent, especially in light of the enactment of 18 U.S.C. § 921. Additionally, this Court

should resolve the conflict among the circuits because it involves an important issue which directly affects the states' ability to grant complete relief of all disabilities resulting from a conviction to a defendant in their own courts and whether the federal government has the power to nullify the relief granted.

This Court should grant certiorari here to explicitly rule that what constitutes the term "conviction" for immigration purposes is entirely dependent on whether or not the state of jurisdiction has granted to a defendant relief from all disabilities resulting from the conviction or plea, and further to resolve the ongoing conflict between the Circuits created by the Fifth Circuit's decision in this matter.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

DATED: May 2, 1995.

Respectfully submitted,

OLLIE RUTH JEFFERSON
Attorney for Petitioner
Lamar East Atrium Offices
1601 East Lamar Blvd.
Suite 106
Arlington, Texas 76011
(817) 861-7002

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40492
Summary Calendar

Decided: Feb. 1, 1995

Morris Winston WILSON,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Alien petitioned for judicial review of Board of Immigration Appeals' order of deportation because of his conviction under Texas law for possession of marijuana. The Court of Appeals held that: (1) defendant's conviction with suspended sentence made him subject to deportation, and (2) his conviction was final despite his suspended sentence when he failed to appeal within direct appeals period.

Affirmed.

Petition for Review of an Order of the Board of Immigration Appeals.

Before KING, JOLLY and DeMOSS, Ciruit

Judges.

PER CURIAM:

Petitioner Morris Winston Wilson seeks review of an order of deportation issued by the Immigration Judge and affirmed by the Board of Immigration Appeals. The deportation order was issued because of Wilson's conviction for possession of marijuana in Dallas County, Texas. Wilson challenges the order, contending that the Board's standard for conviction is contrary to congressional intent and to Supreme Court precedent, and alternatively arguing that his conviction was not final for purposes of deportation. Finding no merit in his contentions, we affirm the decision of the Board.

I. FACTUAL AND PROCEDURAL BACKGROUND

Wilson is a thirty-seven year old native and citizen of Saint Christopher who was admitted into the United States as a nonimmigrant visitor on or about March 3, 1985. On May 19, 1988, his status was adjusted to lawful permanent resident based on his marriage to a United States citizen.

On July 15, 1988, Wilson pleaded guilty to and was convicted of possession of marijuana in a Texas state court in Dallas County. The self-titled "Judgment" stated that "[i]t is therefore found and adjudged by the court, that the said Defendant is guilty of the felony offense" of marijuana possession. Wilson received a sentence of four years confinement and a $500 fine, but the sentence was suspended and Wilson was placed on probation for a period of four years. On July 17, 1992, after Wilson had

satisfactorily fulfilled his conditions of probation, the court entered an order setting aside the judgment of conviction, dismissing the indictment, discharging Wilson from probation, and releasing him from all penalties and disabilities resulting from the judgment of conviction.

The immigration and Naturalization Service ("INS") issued an Order to Show Cause on May 31, 1992, charging Wilson with deportability under section 241(a)(B)(i)[1] of the Immigration and Nationality Act ("INA"). At his hearing, Wilson admitted the allegations against him but denied deportability, arguing that his conviction did not qualify as a conviction for immigration purposes. The Immigration Judge followed the Board of Immigration Appeal's ("BIA") decision in Matter of Ozkok, A-12150228, 1988 WL 235459 (BIA 1988), and concluded that Wilson's conviction was sufficient for immigration purposes. On appeal to the BIA, Wilson argued that the Ozkok test was invalid, and alternatively, Wilson alleged that his

---

[1] Section 241(a)(B)(i) states in the following relevant part:

> Any alien who at any time after entry has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United states, or a foreign country relating to a controlled substance, ... other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

8 U.S.C. § 1251(a)(B)(i). Wilson's conviction did not fall under the thirty gram exception.

probationary sentence did not meet the Ozkok conviction test. He also challenged the finality of his conviction for immigration purposes. The BIA reaffirmed the Ozkok test and rejected Wilson's other arguments. Wilson appeals from the BIA's decision, asserting essentially the same arguments presented to the BIA.

II. STANDARD OF REVIEW

In reviewing challenges to the BIA's interpretation of a statutory term, we apply a two-pronged standard of review. First, we consider "the legal standard under which the INS should make the particular deportability decision." Animashaun v. INS, 990 F.2d 234, 237 (5th Cir, 1993). If the governing statute does not clearly speak to the question before the court, we have "upheld agency interpretations of ambiguous law when that interpretation is reasonable." Id. (citing Chevron, U.S.A., Inc. v. National Resources Defense Counsel, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). as the Supreme Court has noted, "[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer...." Chevron, 467 U.S. at 844, 104 S.Ct. at 2782.

After determining the controlling legal standard, "we will next examine the Board's findings under the substantial evidence test to determine whether the legal standard has been satisfied." Animashaun, 990 F.2d at 237. The substantial evidence standard "requires only that the Board's conclusion be based upon the evidence presented and that it be substantially reasonable." Id.

III. ANALYSIS AND DISCUSSION

A. The Validity of the Ozkok Conviction Standard

Wilson contends that the conviction test announced in the BIA's Ozkok decision is inapplicable because it is inconsistent with congressional intent and with the Supreme Court's decision in Pino v. Landon, 349 U.S. 901, 75 S.Ct. 576, 99 L.Ed 1239 (1955). we disagree with both of these contentions, but we begin by examining the background and history of the Ozkok decision.

1. The foundations of Ozkok

In Matter of Ozkok, after "an extensive review of the relevant case law, legislative history, and INS precedent, the BIA deviated abruptly from long-standing INS and BIA precedent." Martinez-Montoya v. INS, 904 F.2d 1018, 1021 (5th Cir. 1990). Under the narcotics violation provision of the INA, the BIA adopted a uniform federal standard for defining "conviction," rather than retaining a state-by-state standard. Specifically, the BIA stated that "we shall consider a person convicted if the court has adjudicated him guilty or has entered a formal judgment of guilt." Ozkok, 1988 WL at *4. "Where adjudication of guilt has been withheld," however, the Board in Ozkok stated that a conviction will be found for immigration purposes when the following elements are present:

(1) a judge has found the alien guilty or has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilty;
(2) the judge has ordered some form of

punishment, penalty, or restraint on the person's liberty to be imposed (including but not limited to incarceration, probation, a fine or restitution, or community-based sanctions...); and
(3) a judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court's order, without availability of further proceedings regarding the person's guilt or innocence of the original charge.

Id.

Wilson correctly points out that the Ozkok standard represents a departure from the BIA's previous position, which required "the action of the court [to be] considered a conviction by the state for at least for some purpose." Id. at *6-7 n. 4; Martinez-Montoya, 904 F.2d at 1021. In articulating this new standard, the BIA noted that the previous analytical framework was "too narrow and undesirably subject to the vagaries of state law." Martinez-Montoya, 904 F.2d at 1021; Ozkok 1988 WL at *3 (citing Matter of A-F-, 8 I & N Dec. 429, 445-46 (BIA 1959)). The Attorney General noted "the federal policy to treat narcotics offenses seriously," and the Attorney General determined that "it would be inappropriate for an alien's deportability for criminal activity to be dependent upon `the vagaries of state law.' Ozkok, 1988 WL at *3 (quoting Matter of A-F-, 8 I & N Dec. 429, 445-46 (BIA 1959); see also Yanez-Popp v. INS, 998 F.2d 231, 235 (4th Cir. 1993) ("In Ozkok, the Board considered Supreme Court and federal precedent in concluding that Congress intended federal immigration laws to be uniform and that previous interpretations of state `convictions' under varying state laws for immigration

purposes produced `anomalous and unfair results.'") (quoting Ozkok, 1988 WL at *3). Thus, in light of the congressional resolve to combat our nation's drug problem and to unify the conviction standard, the BIA in Ozkok adopted a federal definition of "conviction."

2. Consistency with Congressional Intent

Wilson contends that the Firearms Owner's Protection Act[2]--an amendment to a federal firearms statute--indicates that the federal conviction standard in Ozkok inconsistent with congressional intent. Wilson apparently believes that the enactment of this amendment indicates that Congress intended for the term "conviction" to hinge on whether the state considers the person convicted for some purpose. In other words, according to Wilson, the Amendment reveals that Congress intended for the pre-Ozkok conviction standard to govern

---

[2] The statute states in the following relevant part:

> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such a pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921 (emphasis added).

immigration law because that standard required the action of the court to be considered a conviction by the state for at least for some purpose.

We believe that Wilson's interpretation of the firearms amendment is much too broad. On this point, we wholly agree with the Fourth Circuit's analysis and discussion:

> In Dickerson [v. New Banner Institute, Inc., 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845], [(1983)] the Supreme Court held that for purposes of federal gun control laws, the definition of "conviction" was a question of federal law since there was an absence of Congress' intent to the contrary. Congress subsequently overruled Dickerson [in 18 U.S.C. § 921] by requiring that a conviction be defined in accordance with the laws in which the criminal proceedings are held. However, the case still stands for the general proposition that federal law governs the application of Congressional statutes in the absence of a plain language to the contrary. By overruling the holding in Dickerson, Congress merely provided the contrary indication that state, not federal law, applies in interpreting the federal gun control statute. Here, Congress has not overruled Ozkok with contrary legislation; accordingly, Dickerson persuades us to adopt Ozkok's holding that for the purpose of the INA, federal, rather than state, law is to define a "conviction."

Yannez-Popp, 998 F.2d at 236 (citations omitted) (emphasis added). In other words, the firearms amendment mandates a state definition of

conviction only for the firearms statute that it amends. For the purposes of the INA, the amendment is inapplicable, especially because of the congressional policy to treat narcotics offenses seriously and to unify the deportability standards.

3. Pino v. Landon

Wilson also contends that the BIA's Ozkok decision effectively overruled the Supreme Court's decision in Pino v. Landon, 349 U.S. 901, 75 S.Ct. 576, 99 L.Ed. 1239 (1955). In Pino, an alien had been found guilty of petty larceny in Massachusetts district court. See Pino v. Nicolls, 2215 F.2d 237, 240 (1st Cir. 1954). The court found the defendant guilty, but it suspended his one-year prison sentence and instead imposed probation for one year. See id. at 241. As the Seventh Circuit described:

> Under a special Massachusetts procedure, upon the satisfactory completion of his probation, his sentence was revoked and his case was put "on file." The "on file" status meant that the case remained on the records of the court but no further action would normally be taken. However, it was theoretically possible that the case could again be called up and a sentence imposed, at which time the defendant-alien could appeal from the sentence so imposed and secure a trial de novo in the Massachusetts superior court.

Will v. INS, 447 F.2d 529, 531 (7th Cir. 1971) (describing facts of Pino). The Pino court noted that "[p]lacing the case on file was not equivalent to a revocation of the judicial determination of Pino's guilt...." 215 F.2d at 244-45. The court subsequently held that the

"on file" status of Pino's conviction did not negate its finality. See id. Significantly, however, the court also noted "in the interest of a uniform application of the federal statute, the meaning of the word `convicted' is a federal question...." Id. at 243

In a brief per curiam opinion, Supreme Court reversed the holding of the First Circuit:

> On the record here we are unable to say that the conviction has attained such finality as to support an order of deportation within the contemplation of § 241 of the Immigration and Nationality Act. The judgment is reversed.

349 U.S. at 901, 75 S.Ct. at 576. Thus, it is clear that the Supreme Court only addressed the finality of the conviction in Pino, and the Court expressed no disagreement with the First Circuit's characterization of "conviction" as a federal question. Simply put, the decision of the BIA to apply a federal conviction standard in Ozkok does not infringe at all, either explicitly or implicitly, upon the Supreme Court's holding in Pino. See Yannez-Popp, 998 F.2d at 236 ([N]owhere in the [Pino] decision did the Court disapprove of the First Circuit's statement that `conviction' was to be defined according to federal [and] not state law."). we conclude that the validity of Ozkok is unaffected by the supreme Court's Pino decision.

4. Reasonableness of the Ozkok Standard

[1] Simply put, we agree with the INS that Wilson's contentions are without merit. Ozkok's rule applying a federal "conviction" standard rather than a state standard is reasonable and is consistent with congressional intent and the

relevant case law. Numerous other circuit courts agree. See, e.g., Paredes-Urrestarazu v. INS, 36 F.3d 801, 811 n. 11 (9th Cir. 1994) ("[T]he meaning of the term `conviction' is a question of federal law"); Molina v. INS, 981 F.2d 14, 19 (1st Cir. 1992) ("The federal Constitution permits Congress to condition its immigration law upon the absence of a `conviction' as federally defined."); Chong v. INS, 890 F.2d 284, 285 (11th Cir. 1989) ("The BIA was also correct in not considering the Florida expungement statute because this court, other courts of appeals, and the BIA have expressly held that term `convicted' in the [INA] must be interpreted in accordance with federal standards.") Yazdchi v. INS, 878 F.2d 166, 167 (5th Cir. 1989) ("[T]he consequences which a state chooses to attach to a conviction in its courts for purposes of its own law are for it to say; but they cannot control the consequences to be given it in a deportation proceeding--a function of federal law."); Aguilera-Enriquez v. INS, 516 F.2d 565, 570 (6th Cir. 1975) ('The definition of `convicted' ... is a matter of federal law, to be interpreted in harmony with the policies underlying the Immigration and Nationality Act."); Will v. INS, 447 F.2d 529, 531 (7th Cir. 1971) ("We must, however, agree with other circuits that Congress intended the term `convicted' to be given meaning in light of federal law and policies rather than on the basis of all the peculiarities of the laws of the various states." (internal quotation omitted)).

[2] Moreover, the BIA has discretion to reinterpret the INA if it employs a "reasoned analysis." Rust v. Sullivan, 500 U.S. 173, 187, 111 S.Ct. 1759, 1769, 114 L.Ed.2d 233 (1991). As the Supreme Court noted:

> [A] revised interpretation deserves deference because an initial agency interpretation is not instantly carved in stone and the agency, to engage in informal rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. An agency is not required to establish rules of conduct to last forever, but must be given ample latitude to adapt [its] rules and policies to the demands of changing circumstances.

Id. at 186-87, 111 S.Ct. at 1769 (internal quotations omitted) (citations omitted). Based on our own analysis and on the deference that we accord to the BIA, we conclude that the Ozkok federal conviction standard is reasonable, and we will apply it in the present case. See Martinez-Montoya, 904 F.2d at 1021 ("The federal agency construction is to be upheld if it is reasonable and if it is not contrary to Congressional intent.").

B. Application of the Ozkok Standard

[3] There is substantial evidence to affirm the BIA's conclusion that Wilson is deportable under the Ozkok test. Wilson's arguments regarding the satisfaction of the three Ozkok elements are misplaced and irrelevant, for the three-pronged test is only applicable "[w]here adjudication of guilt has been withheld." Ozkok, 1988 WL at *4. In this case, however, Wilson was not sentenced under the Texas deferred adjudication statute and adjudication of guilt was not otherwise withheld. On the contrary, Ozkok considers a person convicted "if the court has adjudicated him guilty or has entered a formal judgment of guilt." Id. These conditions are satisfied in Wilson's case, as his

"Judgment" explicitly stated that he was "found and adjudged" guilty of marijuana possession by the court; only his sentence was suspended. Thus, there is substantial evidence to support the BIA's conclusion that Wilson has been "convicted" for purposes of the federal immigration laws.

C. Finality of the Conviction

[4] Wilson also contends that his conviction had not achieved a sufficient degree of finality during his probationary period. According to Wilson, his conviction is not final for deportation purposes because his probation remained subject to modification or revocation and because Texas probationers can appeal the revocation of their probation. Once again, we disagree with Wilson's contentions.

As we noted Martinez-Montoya, "[w]e trace the requirement of finality back to the per curiam decision in Pino v. Landon." 904 F.2d at 1025. Significantly, in Martinez-Montoya, we went on to make the following observations:

> The Pino opinion itself gives little indication as to the degree of finality required. But what is crucial is that all subsequent case authority has concluded that unless the alien has exhausted or waived his rights to direct appeal or the appeals period has lapsed the criminal proceeding is not sufficiently final to constitute a conviction for immigration purposes.

Id. at 1026.

As mentioned, Wilson was not sentenced under a deferred adjudication statute; rather,

he was "found and adjudged" guilty and his sentence was suspended. Considering that Wilson's "Judgment" of conviction was entered on July 25, 1988, his thirty-day direct appeals period has clearly lapsed. See Tex.R.App.P 41(b)(1) ("Appeal is perfected when notice of appeal is filed within thirty days after the day sentence is imposed or suspended in open court or the day an appealable order is signed by the trial judge....") (emphasis added). Wilson is simply wrong in his contention that "the Texas procedure allows the defendant to appeal to the Court of Criminal appeals for review of the trial and conviction during the probationary period." The statute does provide that "[t]he right of the probationer to appeal to the Court of criminal appeals for review of the trial and conviction, as provided by law, shall be accorded the probationer at the time he is placed on probation." Tex.Rev.Civ.Stat. Ann. art. 42.12, § 8(b) (Vernon 1979). As mentioned, however, Wilson was placed on probation on July 15, 1988, and his statutory right of appeal lapsed shortly thereafter.

Wilson's finality argument based on the ability to appeal a revocation of probation is also unavailing. Simply put, Wilson's probationary period has been completed; thus, the right to appeal any modification or revocation of probation has lapsed and is inapplicable. Furthermore, Wilson's reliance on the Will opinion is misplaced, as that court agreed that a conviction is not final only when "a direct appeal is pending"--a situation that does not exist in Wilson's case. Will, 447 F.2d at 533. In short, we agree that Wilson's conviction has achieved a sufficient degree of finality for purposes of the federal immigration laws.

IV. CONCLUSION

For the foregoing reasons, the decision of the BIA in support of deportability is AFFIRMED.

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041
==========

Decision of the Board of
Immigration Appeals

Date: March 3, 1994

File:A28 334 308 - Dallas

In re: MORRIS WINSTON WILSON

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF
OF RESPONDENT: Ollie Jefferson Ansley,
Park Plaza, Suite 420
2501 Parkview Drive
Fort Worth, Texas 76102

ON BEHALF OF
SERVICE: Robert Burton
General Attorney

CHARGE:

Order: Sec. 241(a)(2)(B)(i), I&N Act [8 U.S.C.§ 1251(a)(2)(B)(i)] - Convicted of controlled substance violation

APPLICATION: Termination of proceedings

In a decision dated July 1, 1993, the

immigration judge found the respondent deportable under section 241(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2)(B)(i), and ordered him deported from the United States. The respondent has appealed from that decision. The appeal will be dismissed.

The respondent is a 37-year-old native and citizen of St. Christopher who was admitted to the United states at Detroit, Michigan, on or about March 3, 1985, as nonimmigrant visitor for pleasure. His status was adjusted subsequently to that of a lawful permanent resident on May 19, 1988, based on his marriage to a United States citizen.

The record reflects that respondent was convicted on July 15, 1988, in the 203rd Judicial District Court of Dallas County, texas, upon a plea of guilty to possession of marihuana, for which he received a suspended sentence of 4 years' confinement and a 4-year period of probation with a $500 fine. On July 17, 1992, the court entered an order setting aside the judgment of conviction, dismissing the indictment, discharging the respondent from probation, and releasing him from all penalties and disabilities resulting from the judgment of conviction.

The Immigration and naturalization service issued an order to Show Cause (Form I-221S) on May 31, 1992, charging the respondent with deportability under section 241(a)(2)(B)(i) of the Act. At the hearing, the respondent admitted the allegations against him but denied deportability, arguing that his conviction

did not qualify as a conviction for immigration purposes, The Immigration Judge determined that, as the respondent had been found and adjudged guilty of the felony offense of unlawful possession of a controlled substance by the Texas court, his conviction qualified as a conviction for immigration purposes under the standard set by the Board in Matter of Ozkok, 19 I&N Dec. 546 (BIA 1988), notwithstanding the Texas court's July 17, 1992, order. Accordingly, he found that the respondent's deportability under section 241(a)(2)(B)(i) of the Act had been established by clear, unequivocal, and convincing evidence.

On appeal, the respondent argues through counsel that the immigration judge erred in finding that his conviction qualifies as a conviction for immigration purposes. specifically, he contends that the test enunciated in Matter of Ozkok is inapplicable because it is inconsistent with Congressional intent as well as with the precedential Supreme Court decision Pino v. Landon, 349 U.S. 901 (1955), which, in his view, mandates that the state consider the action of the court a conviction for at least some purpose in order for it to qualify as such for immigration purposes. Moreover, he maintains that no conviction exists for immigration purposes in his case even under Matter of Ozkok because he was given a probationary sentence.

The Service moves for summary dismissal of appeal under 8 C.F.R. § 3.1(d)(1-a)(i) "due to lack of specificity." We note that this motion

was made in response to the respondent's Notice of appeal (Form EOIR-26) prior to submission of his brief in support of his appeal. We cannot conclude from a review of the brief that the respondent has failed sufficiently to specify the reasons for his appeal. Accordingly, the motion will be denied. However, we do find that the appeal is a meritless one which should be dismissed.

In matter of Ozkok, after considering Supreme Court and federal precedent, we adopted a uniform federal rather than a state-by-state standard for defining "conviction." Specifically, we held that:

> A conviction exists for immigration purposes where an alien has had a formal judgment of guilt entered by a court or, if adjudication of guilt has been withheld, where all of the following elements are present: (1) a judge or jury has found the alien guilty or where he has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilty, (2) the judge has ordered some form of punishment, penalty, or restraint on the person's liberty to be imposed, and (3) a judgment or adjudication of guilt may be entered if the person violates the order, without availability of further proceedings regarding his guilt or innocence of the original charge. (emphasis added).

In articulating this standard, we noted that our previous standard was undesirably subject to the vagaries of state law, and it permitted aliens who were clearly guilty of criminal behavior and whom Congress intended to be considered "convicted" to escape the immigration consequences normally attendant upon a conviction. Matter of Ozkok, supra, at 551. See also Yannez-Popp v. INS, 998 F.2d 231, 235 (4th Cir.1993).

The respondent correctly points out that the Ozkok standard represented a departure from our previous position, which did require that the action of the court be considered a conviction by the state for at least some purpose. See, e.g, Matter of Seda, 17 I&N Dec. 550 (BIA 1980); Matter of L-R-, 8 I&N Dec. 269 (BIA 1959). See also Yannez-Popp v. INS, supra, at 234; Martinez- Montoya v. INS, 904 F.2d 1018, 1021 (5th Cir. 1990). However, the contention that this standard runs contrary to the holding in Pino v. Landon is incorrect. The Supreme Court Pino, a paragraph-long per curiam decision, merely held that, from the record before the Court, it could not be said that an alien's conviction under a Massachusetts procedure, which permitted the conviction to be revoked and the case put "on file," was final for immigration purposes, thereby reversing the First Circuit's holding to the contrary. See Pino v. Landon, supra; Yanez-Popp v. INS, supra, at 236. Nowhere in the decision did the Court disapprove of the First Circuit's statement that "conviction" was to be defined according to federal not

state law. See Pino v. Nicolls, 215 F.2d 237, 243 (1st Cir. 1954) ("[T]he meaning of the word `convicted' [in the federal immigration law] is a federal question....")

We point out, moreover, that we have discretion to reinterpret the Immigration and National Act if we employ a "reasoned analysis." Rust v. Sullivan, 500 U.S. 173 (1991) ("An agency is not required to `establish rules of conduct to last forever,'... but rather `must be given ample latitude to adapt [its] rules and policies to the demands of changing circumstances.'"); Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 863-64 (1984) ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on continuing basis."); Yanez-Popp v. INS, supra, at 235; Martinez-Montoya, supra, at 1021. we note that a majority of the circuits which have addressed the issue have upheld our position, including the circuit in which this case arises. See, e.g., Yanez-Popp v. INS, supra, at 235 and cases cited therein; Martinez-Montoya v. INS, supra, at 1022; Molina v. INS, 981 F.2d 14, 19 (1st Cir. 1992). Hence, we see no reason to reconsider our holding in Matter of Ozkok.

Thus, applying the Ozkok standard, we find, as did the immigration judge, that a conviction exists for immigration purposes in the respondent's case. The record of conviction reflects that the respondent

was not sentenced under a deferred adjudication statute and adjudication of guilt was not otherwise withheld. On the contrary, he was found and adjudged by the court to be guilty of felony offense of unlawful possession of marihuana. The 3-prong test applicable to cases where the adjudication of guilt has been withheld is inappropriate in this case, and is irrelevant for our purposes.

We note from the respondent's brief that he incorrectly believes that his conviction had not achieved a sufficient degree of finality during his probationary period because such probation remained subject to modification or evocation for cause and because probationers are allowed in Texas to appeal a probation revocation. The respondent's conviction, however, achieved a sufficient degree of finality for deportation purposes when direct appellate review was waived or exhausted. See Montilla v. INS, 926 F.2d 162, 164 (2nd Cir. 1991); Martinez-Montoya v. INS, supra, at 1025. His ability to appeal a revocation of his probation, had it occurred, in no way affected this finality, because matters relating to his probation dealt only with the form of punishment imposed on him for the crime he already was found and adjudged guilty of committing. Consequently, we agree with the immigration judge that deportability as charged has been established by clear, unequivocal, and convincing evidence, as required by Woodby v. INS, 385 U.S. 276 (1966), and 8 C.F.R. § 242.14(a), and we will dismiss the appeal.

ORDER: The appeal is dismissed.

FURTHER ORDER: The Service's motion for summary dismissal is denied.

s/Mary M. Duane
FOR THE BOARD

(2)

Supreme Court, U.S.
FILED
AUG 11 1995

No. 94-1907

In the Supreme Court of the United States

OCTOBER TERM, 1995

MORRIS WINSTON WILSON, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
THOMAS W. HUSSEY
ALISON R. DRUCKER
ELLEN SUE SHAPIRO
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

15 pp

QUESTION PRESENTED

The court of appeals determined that petitioner, an alien who pleaded guilty to a narcotics offense and against whom a judgment of guilt was entered, was "convicted" for purposes of deportation under 8 U.S.C. 1251(a)(2)(B)(i) (1988 & Supp. IV 1992), authorizing deportation of persons convicted of narcotics offenses. In determining that petitioner had been convicted, the court was guided by the holding of the Board of Immigration Appeals in *In re Ozkok*, 19 I. & N. Dec. 546, 551 (1988), that a conviction exists for immigration purposes "if the court has adjudicated [the alien] guilty or has entered a formal adjudication of guilt." The question presented is:

Whether the decision in *Ozkok* is invalid and the court of appeals' decision is consequently erroneous.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Chong v. *INS*, 890 F.2d 284 (11th Cir. 1989)	7
Deris, In re, Interim Dec. 3102 (BIA Apr. 19, 1989)	9
Der-Rong Chour v. *INS*, 578 F.2d 464 (2d Cir. 1978), cert. denied, 440 U.S. 980 (1979)	8
Dickerson v. *New Banner Institute, Inc.*, 460 U.S. 103 (1983)	4
Farrokhi v. *INS*, 900 F.2d 697 (4th Cir. 1990)	8
Florez-de Solis v. *INS*, 796 F.2d 330 (9th Cir. 1986)	8
Golshan, In re, 18 I. & N. Dec. 92 (BIA 1981)	9
Kahlenberg v. *INS*, 763 F.2d 1346 (11th Cir. 1985), cert. denied, 475 U.S. 1120 (1986)	8
Manrique, In re, Interim Dec. 3250 (BIA May 19, 1995)	9, 10
Martinez-Montoya v. *INS*, 904 F.2d 1018 (5th Cir. 1990)	4, 6, 7
Molina v. *INS*, 981 F.2d 14 (1st Cir. 1992)	7
Ozkok, In re, 19 I. & N. Dec. 546 (BIA 1988)	3, 4, 6
Paredes-Urrestarazu v. *INS*, 36 F.3d 801 (9th Cir. 1994)	7
Pino v. *Landon*, 349 U.S. 901 (1955)	5, 6
Pino v. *Nicolls*, 215 F.2d 237 (1st Cir. 1954), rev'd, 349 U.S. 901 (1955)	5
Ravindran v. *INS*, 976 F.2d 754 (1st Cir. 1992)	8
Rehman v. *INS*, 544 F.2d 71 (2d Cir. 1976)	7, 8
Rivera-Zurita v. *INS*, 946 F.2d 118 (10th Cir. 1991)	8
Tejeda-Mata v. *INS*, 626 F.2d 721 (9th Cir. 1980), cert. denied, 456 U.S. 994 (1982)	8-9
Valadez-Salas v. *INS*, 721 F.2d 251 (8th Cir. 1983)	8

Cases—Continued: Page

Yahkpua v. *INS*, 770 F.2d 1317 (5th Cir. 1985) 8
Yanez-Popp v. *INS*, 998 F.2d 231 (4th Cir. 1993) 4, 7

Statutes:

Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1837:
§ 212(a)(2), 98 Stat. 2003 (18 U.S.C. 3607 (Supp. IV 1986) 10
§ 219(a), 98 Stat. 2027 10
§ 235(a)(1), 98 Stat. 2031 10
Sentencing Reform Act, Pub. L. No. 99-217, § 4, 99 Stat. 1728 10
Federal First Offender Act, 18 U.S.C. 3607 9
Firearms Owners' Protection Act, 18 U.S.C. 921 4
Immigration and Nationality Act, 8 U.S.C.1101 *et seq.*:
§ 106(c), 8 U.S.C. 1105a(c) 8
§ 241(a)(2)(B)(i), 8 U.S.C. 1251(a)(2)(B)(i) (1988 & Supp. IV 1992) 2-3, 6
21 U.S.C. 844 7
21 U.S.C. 844(b) 10
Texas Penal Code Ann. art. 4.05 (West 1994) 2

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1907

MORRIS WINSTON WILSON, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 43 F.3d 211. The opinion of the Board of Immigration Appeals (Pet. App. B1-B8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1995. The petition for a writ of certiorari was filed on May 2, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a citizen and native of St. Christopher. In March 1985 he entered the United States as a non-immigrant visitor. In May 1988, following his marriage to a United States citizen, his status was adjusted to that of lawful permanent resident. Pet. App. A2.

On July 15, 1988, petitioner pleaded guilty in Texas state court to unlawful possession of more than four ounces but less than five pounds of marijuana, in violation of Art. 4.05 of the Texas Penal Code (West 1994). The Judicial District Court of Dallas County entered a judgment stating that "[i]t is therefore found and adjudged by the court, that the said Defendant is guilty of the felony offense." Pet. App. A2. Petitioner was sentenced to four years' imprisonment and a $500 fine, but the court suspended the sentence of imprisonment in favor of a four-year period of probation. *Ibid.*

Petitioner served his sentence of probation. On July 17, 1992, the court entered an order discharging petitioner from probation. That order set aside the conviction, dismissed the indictment, and released petitioner from "all penalties and disabilities resulting from the Judgment of Conviction in this cause." A.R. 57;[1] Pet. App. A2-A3.

2. On May 31, 1992, several weeks before the end of petitioner's probation, the Immigration and Naturalization Service (INS) issued an order to show cause why petitioner should not be deported under Section 241(a)(2)(B)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(2)(B)(i) (1988

---

[1] The Administrative Record is cited herein as "A.R. __."

& Supp. IV 1992). Pet. App. A3. That Section provides that "[a]ny alien who at any time after entry has been convicted of a violation of * * * any law or regulation of a State, the United States, or a foreign country relating to a controlled substance * * * is deportable."[2] Petitioner admitted the allegations against him, but contended that his conviction did not qualify as a conviction for immigration purposes because, upon completion of his sentence, the court set aside the indictment and all penalties and disabilities resulting from the conviction. Pet. App. A3; A.R. 49, 71-74. In an oral decision on July 1, 1993, the immigration judge rejected petitioner's argument and found that the formal judgment of guilt entered against petitioner amounted to a "conviction" under Section 241, rendering him deportable. Pet. App. A3; A.R. 37-41. The Board of Immigration Appeals (BIA) agreed, and dismissed the appeal. Pet. App. B1-B8.

3. In a per curiam opinion, the Fifth Circuit affirmed. Pet. App. A1-A15. The court held that petitioner's conviction met the standard set forth in the BIA's decision in *In re Ozkok*, 19 I. & N. Dec. 546, 551 (BIA 1988), under which the BIA "shall consider a person convicted if the court has adjudicated him guilty or has entered a formal judgment of guilt." Pet. App. A12. The court acknowledged that "the *Ozkok* standard represents a departure from the BIA's previous position, which required 'the action of the court [to be] considered a conviction by the state

---

[2] The Section expressly exempts a conviction for "a single offense involving possession for one's own use of 30 grams or less of marijuana," 8 U.S.C. 1251(a)(2)(B)(i) (1988 & Supp. IV 1992), but petitioner's conviction did not fall under that exception. Pet. App. A3 n.1.

for at least some purpose.'" *Id.* at A6 (citing *Ozkok*, 19 I. & N. Dec. at 549 n.4; *Martinez-Montoya* v. *INS*, 904 F.2d 1018, 1021 (5th Cir. 1990)). The court held that the BIA's revised interpretation of "conviction" was a reasonable one, however, consistent with congressional intent and with this Court's precedents. Pet. App. A9-A12.

The court rejected petitioner's contention that the Firearms Owners' Protection Act (FOPA), 18 U.S.C. 921, manifested congressional intent to employ the BIA's pre-*Ozkok* interpretation of "conviction" under the INA. Pet. App. A7-A9. Petitioner asserted that the FOPA undermined the premise of *Ozkok* that the meaning of "conviction" under the INA is a question of federal law. He pointed to the fact that *Ozkok* had referred to this Court's holding in *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103 (1983), that the definition of "conviction" under the federal firearms statute was a question of federal law. Because Congress in the FOPA overruled *Dickerson* and expressly provided that the meaning of "conviction" is "to be determined in accordance with the law of the jurisdiction in which the proceedings were held," 18 U.S.C. 921, petitioner urged that *Ozkok*, too, was invalid. The court of appeals, however, concurred with the Fourth Circuit's observation in *Yanez-Popp* v. *INS*, 998 F.2d 231, 236 (1993), that *Dickerson* "still stands for the general proposition that federal law governs the application of Congressional statutes in the absence of a plain language to the contrary." Pet. App. A8. The court below concluded that "the firearms amendment mandates a state definition of conviction *only for the firearms statute that it*

amends. For the purposes of the INA, the amendment is inapplicable." Pet. App. A8-A9.

The court of appeals also rejected petitioner's contention that the *Ozkok* standard conflicts with *Pino* v. *Landon*, 349 U.S. 901 (1955) (per curiam). *Pino* addressed the effect under the INA of an alien's petty larceny offense where the state court found him guilty but placed the case "on file," thereby deferring the imposition of any judgment or sentence and also postponing any consequent appeal. See Pet. App. A9. This Court's one-paragraph decision in *Pino* stated:

> On the record here we are unable to say that the conviction has attained such finality as to support an order of deportation within the contemplation of § 241 of the Immigration and Nationality Act. The judgment is reversed.

349 U.S. 901, 901. Of importance to petitioner was the fact that, in the course of its opinion, the First Circuit in *Pino* had noted that "the meaning of the word 'convicted' is a federal question," Pet. App. A10 (quoting *Pino* v. *Nicolls*, 215 F.2d 237, 243 (1954)); petitioner gleaned from the Supreme Court's reversal a rejection of that view. The court below observed, however, that this Court in *Pino* "expressed no disagreement with the First Circuit's characterization of 'conviction' as a federal question," but simply had not addressed the issue. Pet. App. A10.

Pino also provided no basis for petitioner's contention that his conviction was not final, and that it therefore could not be the basis for his deportation. Pet. App. A13-A14. Although *Pino* itself gives little guidance regarding the standard of finality, the court noted, "all subsequent case authority has concluded that unless the alien has exhausted or waived his

rights to direct appeal or the appeals period has lapsed the criminal proceeding is not sufficiently final to constitute a conviction for immigration purposes." *Id.* at A13 (quoting *Martinez-Montoya*, 904 F.2d at 1026). The court observed that petitioner was not sentenced under a deferred adjudication statute; rather, his conviction was final on July 25, 1988, and his 30-day appeal period lapsed in August of that year. Pet. App. A13-A14.

ARGUMENT

1. Petitioner contends that the court of appeals erred in determining that he was convicted of a narcotics offense and is therefore subject to deportation under Section 241(a)(2)(B)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(2)(B)(i) (1988 & Supp. IV 1992). The Board of Immigration Appeals announced the governing interpretation of "conviction" in *In re Ozkok*, 19 I. & N. Dec. 546 (BIA 1988), and petitioner does not question that his conviction meets the *Ozkok* standard. Rather, he asserts (Pet. 8-12, 16-21) that *Ozkok* is invalid because it conflicts with congressional intent, and with this Court's decision in *Pino* v. *Landon*, 349 U.S. 901 (1955) (per curiam).[3]

---

[3] Although petitioner contends that the court of appeals' fundamental error was in failing to view interpretation of "conviction" as a question of state law, petitioner has failed even to assert that, if Texas law controlled, the judgment against him would not be treated as a conviction. Moreover, petitioner erroneously assumes that, if *Ozkok* were invalid, state law would govern. Even the BIA's pre-*Ozkok* interpretation of "conviction" was a federal-law standard—albeit one that placed greater emphasis on the consequences the States attached to judgments of conviction. Indeed, petitioner himself

The court of appeals correctly rejected petitioner's attack on *Ozkok*, and its decision is consistent with the uniform adherence to the *Ozkok* standard by other courts of appeals. See, *e.g.*, *Paredes-Urrestarazu* v. *INS*, 36 F.3d 801, 811 n.11 (9th Cir. 1994); *Yanez-Popp* v. *INS*, 998 F.2d 231, 234-237 (4th Cir. 1993); *Molina* v. *INS*, 981 F.2d 14, 18-23 (1st Cir. 1992); *Martinez-Montoya* v. *INS*, 904 F.2d 1018, 1021, 1024 (5th Cir. 1990); *Chong* v. *INS*, 890 F.2d 284, 285 (11th Cir. 1989) (per curiam). No further review is therefore warranted.

2. a. Petitioner also contends that, as a first offender convicted of simple possession of marijuana, he should be exempt from deportation under the analysis of *Rehman* v. *INS*, 544 F.2d 71 (2d Cir. 1976). Pet. 12-16. *Rehman* held that an alien was not subject to deportation because his conviction of possession of marijuana under New York law was accompanied by a "certificate of relief from disabilities," 544 F.2d at 72, and because, had he been prosecuted under federal law, he would have been entitled as a first offender to full expungement of his conviction under 21 U.S.C. 844. Judge Lumbard reasoned that

---

implicitly acknowledges as much. See Pet. 12 (referring to the pre-*Ozkok* decision in *Rehman* v. *INS*, 544 F.2d 71 (2d Cir. 1976), as agreeing with the decision below "that the definition of what constitutes 'conviction' is an issue of federal and not state law"). What petitioner apparently seeks is not application of state as opposed to federal law, but application of the BIA's pre-*Ozkok* (federal-law) standard, under which even a formal judgment of conviction was not a basis for deportation unless the state attached legal consequences to it. See pages 3-4, *supra*.

> where mandatory deportation would frustrate the purposes of a state's relief statute, and federal law provides for erasure of federal convictions under circumstances identical to those of the case at issue, it seems to us that the state's leniency policy can be respected without fear of undermining enforcement of federal deportation laws. States' freedom to remove persons from the ambit of deportation law would extend no further than where Congress itself has gone for federal criminals.

544 F.2d at 75.

Rehman provides no basis for further review here. The claim that petitioner's deportation is inconsistent with coordinate state and federal policies regarding treatment of first offenders is beyond the scope of the questions presented in the petition. Moreover, petitioner raises this contention for the first time in this Court; his failure to raise it in the immigration courts or before the Fifth Circuit waived it.[4]

---

[4] Section 106(c) of the INA, 8 U.S.C. 1105a(c), requires an alien to exhaust "the administrative remedies available to him as of right under the immigration laws and regulations" before seeking review of an adverse deportation determination in the courts of appeals. That provision forecloses judicial review of claims aliens fail to raise in their administrative appeals. See, *e.g.*, *Ravindran* v. *INS*, 976 F.2d 754, 761 (1st Cir. 1992); *Rivera-Zurita* v. *INS*, 946 F.2d 118, 120 n.2 (10th Cir. 1991); *Farrokhi* v. *INS*, 900 F.2d 697, 700 (4th Cir. 1990); *Florez-de Solis* v. *INS*, 796 F.2d 330, 335 (9th Cir. 1986); *Yahkpua* v. *INS*, 770 F.2d 1317, 1320 (5th Cir. 1985); *Kahlenberg* v. *INS*, 763 F.2d 1346, 1352 (11th Cir. 1985), cert. denied, 475 U.S. 1120 (1986); *Valadez-Salas* v. *INS*, 721 F.2d 251, 252 (8th Cir. 1983); *Tejeda-Mata* v. *INS*, 626 F.2d 721, 726 (9th Cir. 1980), cert.

b. Although petitioner did not raise the issue below or properly present it here, he may actually be exempt from deportation as a first offender. The Board of Immigration Appeals (BIA) in *In re Manrique*, Interim Dec. 3250 (BIA May 19, 1995), modified its position regarding the immigration consequences of a first narcotics offense prosecuted under state law. Before *Manrique*, an alien prosecuted for a narcotics offense under state law was ineligible for deportation due to his status as a first offender only if the statute under which he was prosecuted was the state "equivalent" or "counterpart" to the Federal First Offender Act (FFOA), 18 U.S.C. 3607.[5] See, *e.g.*, *In re Deris*, Interim Dec. 3102 (BIA Apr. 19, 1989); *In re Golshan*, 18 I. & N. Dec. 92 (BIA 1981). In the interest of uniform implementation of the immigration laws, however, the BIA in *Manrique* determined that even an alien whose conviction is set aside pursuant to a state statute that is not equivalent to the FFOA should nonetheless be exempt from deportation based upon the conviction if

---

denied, 456 U.S. 994 (1982); *Der-Rong Chour* v. *INS*, 578 F.2d 464, 468 (2d Cir. 1978), cert. denied, 440 U.S. 980 (1979).

[5] Manrique had been convicted of possession of cocaine under Louisiana law and was sentenced to five years' probation and to payment of a fine of $5,000. Applying the BIA's former standard, the immigration judge held that the Louisiana statute under which Manrique had been prosecuted was not an exact equivalent of the FFOA because it was not limited to controlled substance offenses, but authorized first-offender treatment for a broader range of offenses. Because petitioner failed to raise it, the question whether the Texas law under which petitioner's conviction was expunged was equivalent to the FFOA was never addressed in the immigration proceedings or the court of appeals.

he would have been eligible for first-offender treatment had he been prosecuted under federal law. *Manrique*, slip op. 11.[6]

Manrique applies to aliens prosecuted under state law who demonstrate that: (1) they are first offenders, not previously convicted of violating any federal or state law relating to controlled substances; (2) they have pled or been found guilty of the offense of simple possession of a controlled substance; (3) they have not previously been accorded first offender treatment under any law; and (4) the state court has entered an order pursuant to a state rehabilitative statute under which the alien's criminal proceedings have been deferred pending successful completion of probation or the proceedings have been or will be dismissed after probation. Slip op. 12.

Petitioner may meet those criteria.[7] If he had raised the issue below and properly presented it here,

---

[6] The federal first offender statute in effect when the initial immigration decision was made in this case, 21 U.S.C. 844(b), was repealed by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, §§ 219(a), 235(a)(1), 98 Stat. 2027, 2031, amended by the Sentencing Reform Act, Pub. L. No. 99-217, § 4, 99 Stat. 1728, but Congress simultaneously reenacted a revised version of the first offender statute, effective November 1, 1987. Pub. L. No. 98-473, Tit. II, § 212(a)(2), 98 Stat. 2003, codified at 18 U.S.C. 3607 (Supp. IV 1986).

[7] It appears that petitioner had no prior federal or state controlled substance convictions, and that he had not previously been accorded first offender treatment under any law. He pled guilty to the charge of possession of marijuana. Petitioner served four years' probation, and the state court thereafter set aside the conviction, dismissed the indictment, and released petitioner from all disabilities of the conviction; the $500 fine, however, was not set aside.

we would suggest that the decision of the court of appeals be vacated and the case remanded for further proceedings in light of *Manrique*.[8] Because the court of appeals correctly decided the issues petitioner presented to it, however, we believe that the appropriate course is to deny the current petition. The INS would not, however, oppose a motion by petitioner to reopen proceedings before the BIA to litigate the question whether *Manrique* applies to exempt petitioner from deportation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

THOMAS W. HUSSEY
ALISON R. DRUCKER
ELLEN SUE SHAPIRO
Attorneys

AUGUST 1995

---

[8] The BIA in *Manrique* itself remanded that case to the immigration judge to determine whether the alien met the new criteria.